CHONG KEAT REALTY SDN BHD

v.

BAN HIN LEE BANK BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
RAHMAH HUSSAIN JCA
VINCENT NG J
[CIVIL APPEAL NO: P-02-153-1997]
13 JUNE 2003

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Principles applicable - Affidavit in support of originating summons praying for order for sale not complying with rules of court - Whether order for sale a nullity and should be set aside ex debito justitiae - Jurisdiction and power of court to set aside orders that have been drawn up - Conditions under which court may set aside such orders - Vitiating elements - Whether there must be a contravention of a substantive statutory prohibition - Whether an irregularity amounting to a breach of a rule of practice sufficient - Whether an order of court obtained in breach of a rule of practice may be set aside at any time*

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Orders obtained in breach of procedural provisions - New approach - Correct question to ask - Nature of injustice caused to opposing party as a result of breach of procedural provision - Not merely whether procedural provision is mandatory or directory*

LAND LAW: *Charge - Order for sale - Application to set aside order for sale - Affidavit in support of originating summons praying for order for sale not complying with O. 83 r. 3 Rules of the High Court 1980 - Whether order for sale a nullity and should be set aside ex debito justitiae - Whether court has power to set aside order for sale after it has been drawn up - Whether order for sale obtained ex parte or by default - Whether order for sale tainted by fraud or some other vitiating element - Whether any injustice caused to chargor*

The salient facts leading to the instant appeal were that the chargee/bank ('the plaintiff') had instituted foreclosure proceedings against the chargor/borrower ('the defendant') in November 1988 following the latter's default in the repayment of its loan. The defendant, however, failed to oppose the plaintiff's summons as it did not file any affidavit in opposition or take any objection

thereto. The judge-in-chambers thus granted the statutory sale sought by the plaintiff on 5 April 1989. Several public auctions were then held but there were no purchasers each time. Eight years later, on 19 March 1997, the defendant made an application to have the order for sale set aside. The instant appeal was from the decision of the High Court dismissing the defendant's said application. The sole ground of appeal advanced by the defendant was that the order for sale was invalid because the affidavit in support of the plaintiff's originating summons ran foul of O. 83 r. 3 Rules of the High Court 1980 ('RHC') in that it did not state the amount due as at the date on which the court was moved for the order for sale. It was contended, citing the previous decision of the Court of Appeal in *Diamond Peak Sdn Bhd v. United Merchant Finance* [2003] 2 CLJ 8 CA, that O. 83 r. 3 RHC being mandatory, the plaintiff's non-compliance with it was fatal to the order for sale made, which order, being a nullity, must be set aside *ex debito justitiae.*

Held:

Per Gopal Sri Ram JCA

[1] Unless a judgment or an order of the court is obtained by default or in the absence of a party, or is otherwise 'tainted by fraud or some other vitiating element', the court has **no** power under any application in the same action to alter or vary it or set it aside. The 'vitiating element' must be one that contravenes a 'substantive statutory prohibition' and **not** merely an irregularity amounting to a breach of a rule of court or of practice. In the present case, the impugned order for sale was **not** one that was obtained *ex parte* or in default of the defendant's appearance; it was made *inter partes.* Hence, the High Court would, in the circumstances, have **no** power to set aside the order for sale as prayed for by the defendant. (*Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 FC; *Hock Hua Bank v. Sahari Murid* [1981] MLJ 143 FC followed.) (pp 537 g & 538 a-h)

[2] The facts in *Diamond Peak Sdn Bhd v. United Merchant Finance* [2003] 2 CLJ 8 CA were readily distinguishable from those obtaining in the present case. The *inter partes* order for sale in that earlier case was set aside despite a six-year delay primarily because the chargee there had breached the mandatory provisions of s. 257(1)(b) National Land Code 1965. The chargee's failure to comply with O. 83 r. 3 RHC was only an **added** reason for setting aside the order for sale there. (p 539 a-d)

[3] It would be fallacious to propose, as did the defendant, that an order of court obtained in breach of a rule of practice could be set aside at any time. Were it otherwise, a litigant would be in a position to abuse the rules of court, oppress his opponent and thereby occasion an injustice. (pp 539 h & 540 c)

[4] The courts are concerned with the dispensation of both procedural and substantive justice according to the merits of a given case. Thus when a party to litigation complains of a breach of a procedural provision by his opponent, the primary question is **not** whether that particular provision is to be regarded as mandatory or directory according to the language in which it is couched. The **correct question** that the judicial arbiter should ask himself is this: what injustice has the complaining party suffered by reason of the procedural breach? The answer to this question will ultimately determine whether the court shall uphold or reject the procedural complaint. In the present case, no form of injustice whatsoever was caused unto the defendant. (pp 540 d-g, 541 a-h & 542 a-b)

[5] It would be wrong and misleading to refer to a judgment or order of a superior court of unlimited jurisdiction as a 'nullity' as did the defendant in respect of the impugned order for sale made by the High Court. (p 539 e-g)

[Defendant's appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Fakta-fakta utama yang membawa kepada rayuan ini adalah bahawa pemegang gadaian/bank ('plaintif') telah memulakan tindakan penutupan awal terhadap penggadai/peminjam ('defendan') dalam bulan November 1988 apabila defendan ingkar membayarbalik pinjamannya. Defendan, sebaliknya, gagal untuk menentang saman plaintif kerana ia tidak memfailkan sebarang afidavit balasan ataupun membuat sebarang bangkangan terhadapnya. Hakim dalam kamar dengan itu telah membenarkan jualan berkanun yang dituntut oleh plaintif pada 5 April 1989. Beberapa lelongan-lelongan awam telah diadakan tetapi pada setiap kalinya tiada sebarang pembeli. Lapan tahun kemudian, pada 19 Mac 1997, defendan telah membuat satu permohonan untuk mengenepikan perintah jualan. Rayuan ini adalah satu rayuan terhadap keputusan Mahkamah Tinggi yang menolak permohonan defendan itu. Satu-satunya alasan yang dikemukakan oleh defendan dalam rayuan ini adalah bahawa perintah jualan tersebut tidak sah kerana afidavit yang menyokong saman pemula plaintif tidak mematuhi A. 83 k. 3 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') kerana ianya tidak menyatakan jumlah yang kena bayar pada tarikh mahkamah dipohon untuk

perintah jualan tersebut. Ia mengatakan, dengan memetik keputusan terdahulu Mahkamah Rayuan dalam *Diamond Peak Sdn Bhd lwn. United Merchant Finance* [2003] 2 CLJ 8 CA, bahawa oleh kerana A. 83 k. 3 adalah mandatori, ketidakpatuhan plaintif menyebabkan perintah tersebut batal dan dengan itu ianya mestilah diketepikan *ex debito justitiae.*

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Melainkan jika penghakiman atau perintah mahkamah diperolehi secara ingkar atau dengan ketidakhadiran satu pihak, atau ianya 'dicemari oleh fraud atau sebarang unsur cacat', mahkamah tidak mempunyai kuasa dibawah sebarang permohonan di dalam tindakan yang sama untuk meminda atau mengubah atau mengenepikannya. 'Unsur cacat' tersebut mestilah sesuatu yang bercanggah dengan 'larangan berkanun yang substantif' dan bukan hanya sesuatu luar aturan yang merupakan satu perlanggaran kaedah mahkamah atau amalan mahkamah. Dalam kes ini, perintah jualan yang dipertikaikan itu bukannya sesuatu yang diperolehi secara *ex parte* atau tanpa kehadiran defendan; ianya dibuat *inter partes.* Oleh yang demikian, Mahkamah Tinggi, dalam keadaan ini, tidak mempunyai kuasa untuk mengenepikan perintah jualan sebagaimana yang dipohon oleh defendan. (*Badiaddin Mohd Mahidin & Anor lwn. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 FC; *Hock Hua Bank lwn. Sahari Murid* [1981] MLJ 143 FC diikuti.)

[2] Fakta-fakta di dalam *Diamond Peak Sdn Bhd lwn. United Merchant Finance* [2003] 2 CLJ 8 CA dapat dibezakan dengan jelas dari kes ini. Perintah jualan *inter partes* di dalam kes terdahulu diketepikan walaupun setelah enam tahun berlalu kerana pemegang gadai didalam kes tersebut telah melanggar peruntukan mandatori dibawah s. 257(1)(b) Kanun Tanah Negara 1965. Kegagalan pemegang gadai untuk mematuhi A. 83 k. 3 KMT hanya alasan tambahan untuk mengenepikan perintah jualan tersebut.

[3] Adalah satu falasi untuk mencadangkan, sebagaimana yang dicadangkan oleh defendan, bahawa sesuatu perintah mahkamah yang diperolehi yang melanggar satu kaedah amalan dapat diketepikan pada bila-bila masa. Jika ianya sebaliknya, litigan akan dapat menyalahgunakan kaedah-kaedah mahkamah, menindas lawannya dan dengan itu akan menimbulkan ketidakadilan.

[4] Mahkamah mengambil berat mengenai keadilan prosedur dan keadilan substantif mengikut merit kes yang berkenaan. Oleh yang demikian, apabila satu pihak didalam satu litigasi membuat aduan mengenai satu perlanggaran peruntukan prosedur oleh pihak lawannya, persoalan utama bukannya

samada peruntukan tersebut dipandang mandatori atau panduan mengikut bahasa yang diungkapkan. Soalan yang betul yang patut disoal oleh hakim pada dirinya adalah: Ketidakadilan apakah yang ditanggung oleh pengadu yang disebabkan oleh perlanggaran prosedur tersebut? Jawaban kepada soalan tersebut akan pada akhirnya memutuskan samada mahkamah akan membenarkan atau menolak aduan prosedur tersebut. Dalam kes ini, tidak terdapat sebarang ketidakadilan terhadap defendan.

[5] Adalah salah dan mengelirukan untuk merujuk kepada sesuatu penghakiman atau perintah mahkamah yang lebih tinggi yang mempunyai bidangkuasa yang tiada had sebagai satu 'pembatalan' sebagaimana yang dibuat oleh defendan berhubung dengan perintah jualan yang dibuat oleh Mahkamah Tinggi.

Rayuan defendan ditolak.]

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab-Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(foll)***

Diamond Peak Sdn Bhd v. United Merchant Finance [2003] 2 CLJ 8 CA ***(dist)***

Hock Hua Bank v. Sahari Murid [1981] MLJ 143 ***(foll)***

Lee Tain Tshung v. Hong Leong Finance Bhd [2000] 4 CLJ 15 CA ***(refd)***

Mokhtar Amin v. Mohamed Moktar Omar [2001] 4 CLJ 489 CA ***(foll)***

Legislation referred to:

National Land Code 1965, s. 257(1)(b)

Rules of the High Court 1980, O. 83 r. 3

For the appellant/defendant - Mahinder Singh Dulku (Harjit Singh); M/s Harjit Singh Sangay & Co

For the respondent/plaintiff - Teoh Soo Bee; M/s K Ahmad & Yong

[Appeal from High Court, Pulau Pinang; Originating Summons No: 24(31)-885-1988]

Reported by Gan Peng Chiang

JUDGMENT

Gopal Sri Ram JCA:

This is the judgment of the court.

This appeal is directed against the order of the High Court in Penang whereby the appellant's application to set aside an order for sale was dismissed. The brief factual matrix against which this appeal rests is as follows.

The charge which is the subject matter of the present litigation was executed as long ago as 1986. The appellant having defaulted in its obligation to make prompt re-payment, the respondent bank instituted foreclosure proceedings in November 1988. The originating summons claiming the appropriate statutory relief was duly served on the appellant. It entered an appearance and retained counsel who appeared on the date appointed for the hearing of the summons. No affidavit in opposition to the bank's application was ever filed. Neither was objection taken as to the non-observance of any rule of court. There was simply no resistance at all. So, on 5 April 1989, the judge sitting in chambers granted the bank the relief sought. Then, the usual procedural steps were set in motion to have the land sold in public auction. Several attempts were made to sell off the land. But there were no buyers at each auction that was held. Then, on 19 March 1997, that is to say, some eight years after the order for sale was granted, the appellant took out a summons to set that order aside. The High Court dismissed that summons. The appellant has now appealed against that dismissal.

Only one ground was advanced in support of the appellant's application in the court below. It was repeated before us on Monday (9 June 2003) when we heard arguments on the appeal. It is that the order for sale is invalid because the affidavit in support of the originating summons did not comply with RHC O. 83 r. 3 in that it did not state the amount due as at the date on which the court was being moved for an order for sale. The appellant's case is that r. 3 of O. 83 is mandatory in nature so that a failure to comply with its terms fatally flawed the order for sale. The argument goes that there is no discretion in the judge to refuse the appellant's application because the order for sale is a nullity and the appellant is therefore entitled to set it aside *ex debito justitae*, that is to say, as of right, without the court going into the substantial merits of the case.

Now, as a first step to deciding this appeal, it is essential that the principle applicable to the facts must be identified. To this end, it is important to notice a feature of this case that is of critical importance. This is not a case where the impugned order was obtained *ex parte* the appellant. It was not an order made in default of the appellant's appearance. The order here was made *inter partes*. The appellant was very much present by its advocate at the hearing of the bank's summons to foreclose. The principle applicable to the setting aside of such an order was set out by Chang Min Tat FJ in *Hock Hua Bank v. Sahari bin Murid* [1981] MLJ 143, 144:

> Clearly the court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in Order 28 rule 11 Rules of the Supreme Court 1957 (Order 20 rule 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court: *Re St Nazaire Co* 12 Ch D 88, *Kelsey v. Doune* [1912] 2 KB 482; *Hession v. Jones* [1914] 2 KB 421, unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Hong v. Neotia & Co* [1918] AC 888 and *Jonesco v. Beard* [1930] AC 298. The hearing of the action will in a proper case be expedited: *Smith v. Peizer* 65 SJ 607.

Now, it is true that his lordship uses the expression "a judgment regularly obtained" in the passage above quoted. But, when the judgment is read as a whole, it is plain that the Federal Court when using that expression was referring to a judgment that was tainted by fraud or some other vitiating element and not a judgment that was merely irregular in the sense that it is one obtained in breach of a rule of court or of practice. As was made clear by Mohd Azmi FCJ in *Badiaddin bin Mohd Mahidin & Anor v. Arab-Malaysian Finance Bhd* [1998] 2 CLJ 75:

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitia*e to a category of cases involving orders which contravened 'any written law', *the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law.* The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception. (emphasis added.)

Applying the foregoing principles to the present instance, we are of the view that the High Court had no power to grant the order sought by the appellant. Although the High Court decided the case on other grounds – grounds that were the subject of criticism before us – in our considered judgment, the order of the court below is amply supportable for the reasons we have stated a moment ago.

Learned counsel for the appellant placed much reliance upon the decision of this court in *Diamond Peak Sdn. Bhd. v. United Merchant Finance* [2003] 2 CLJ 8 in support of his submission that neither long and inordinate delay nor the fact that the order for sale was made in the presence of the appellant's counsel could detract from the invalidity of the order occasioned by non-compliance with the mandatory provisions of RHC O. 83 r. 3. We have carefully examined that case and find it readily distinguishable from the present. In *Diamond Peak*, the principal ground of complaint was the breach by the chargee of the mandatory provisions of s. 257(1)(b) of the National Land Code 1965. This court had found this complaint to be entirely justified. It accordingly set aside the order for sale despite a delay of six years on the part of the chargor in making its application and despite the order having been made in the presence of the chargor's counsel. This is entirely in keeping with the principle enunciated by Mohd Azmi FCJ in *Badiaddin* and no difficulty is thereby occasioned. However, this court also relied on the chargee's failure to observe the mandatory requirements of RHC O. 83 r. 3 as an added reason for setting aside the order for sale. This was not a point strictly necessary for the outcome of the case on its merits. It is therefore pure obiter. Had counsel for the chargee brought the decision of the former Federal Court in *Hock Hua Bank v. Sahari bin Murid* to the attention of the Division of this court that heard the *Diamond Peak* case, the result may well have been different.

Before we conclude there are three matters that we think we ought to address as these are points relevant to the arguments addressed to us. First, throughout the argument in this case, counsel for the appellant kept referring to the impugned order for sale as a nullity. With respect we cannot agree with this nomenclature. In our view, it is wrong and misleading to refer to orders made and judgments entered by a superior court of unlimited jurisdiction as "nullities". They are not. Of course, every superior court has power to set aside *ex debito justitae* default judgments and orders entered in breach of a rule of court or of practice. But this is a far cry from terming such default orders and judgments as "nullities". See, *Lee Tain Tshung v. Hong Leong Finance Bhd* [2000] 4 CLJ 15, per NH Chan JCA. It follows that the order for sale in the present case was not by any stretch of the imagination a nullity.

The second point has to do with the effect of the delay of some eight years in the instant case. It was suggested by learned counsel for the appellant that an order obtained in breach of or in non-compliance with the rules of court may be set aside at any time. With respect, in our view this is an untenable proposition. Were it otherwise, a litigant would be in a position to abuse a rule of court, oppress his opponent and thereby occasion an injustice. As this court observed in *Mokhtar bin Amin v. Mohamed Moktar bin Omar* [2001] 4 CLJ 489:

> A rule of court, like any other provision, may be the subject of abuse. And it is the function and duty of the courts to be ever vigilant against this. An excellent example of a case of the prevention of an abuse of a rule of court is *Stewart Chartering Ltd v. C & O Managements SA & Ors* [1980] 1 All ER 718. In that case, the chief clerk in the judgment room had declined to accept a default judgment form in the ordinary way. Robert Goff J however granted the plaintiff in that case leave to enter judgment in default despite the terms of O. 13 r. 6(1). He did so in order to prevent an abuse of the court's process.

Now let us take this very case. Here we have a situation where the defendant to foreclosure proceedings enters an appearance, instructs counsel who attends the hearing in chambers and raises no opposition whatsoever to the making of the order. Nothing is said about the affidavit being defective. Then, after the passage of some eight years it comes forward with the argument that the order was made on a defective affidavit and that it ought therefore to be set aside. In our view the appellant's conduct amounts to an abuse of the court's process. If accepted, it would be an affront to justice.

Lastly, there is the question of the modern approach to the breach of procedural provisions by a litigant. It is to be emphasised that the courts are concerned with the dispensation of both procedural and substantive justice according to the merits of a given case. So, when a party to litigation complains of breach of a procedural provision by his opponent, the primary question is not whether the particular provision is to be regarded as mandatory or directory according to the terms of the language in which it is couched. The correct question that the judicial arbiter should ask himself is this: What injustice has the party complaining suffered by reason of the procedural breach? It is the answer to this question that will ultimately determine whether the court should uphold or reject a procedural complaint.

In Mokhtar bin Amin, this court held as follows:

> The modern approach towards procedural irregularities and the interpretation of what are usually considered to be mandatory or directory provisions is one of greater flexibility than that adopted heretofore. It is exemplified by the following passage in the judgment of Lord Woolf MR in *R v. Immigration Tribunal ex parte Jeyeanthan* [1999] 3 All ER 231. It is a case of the first importance. This is what the Master of the Rolls there said (at p. 236):

> An examination of the relevant authorities, the leading textbooks and the numerous authorities to which they refer confirm the limitations of applying a solely mandatory/directory classification (see *Wade and Forsyth Administrative Law* (7th Ed 1994) p 255; *Supperstone and Goudie Judicial Review* (2nd Ed 1997) Ch 4 and *de Smith, Woolf and Jowell Judicial Review of Administrative Action* (5th Ed 1995) pp 265-271). Frequently the investigation involves doing no more than deciding the sense in which the word "shall" has been used as part of a particular procedural requirement. As the word "shall" is normally inserted to show that something is required to be done, the exercise tends to be an unrewarding one. Much more important is to focus on the consequences of non-compliance. Here the authorities show no constant pattern. This is the result of courts in those cases focusing on the issue of whether or not a requirement is mandatory and ignoring or failing to pay sufficient attention to the issue of the consequences of non-compliance with, in particular, a mandatory requirement.

After referring to the speech of Lord Hailsham of St Marylebone LC in *London and Clydesdale Estates Ltd v. Aberdeen DC* [1979] 3 All ER 876, and quoting a passage therefrom, the Master of the Rolls continued as follows:

> Bearing in mind Lord Hailsham LC's helpful guidance I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows: Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question). Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)
>
> Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver.

> This, I think, is the approach that should be adopted by our courts. In my judgment, the non-compliance of procedural requirements should not be treated as invalidating any action or other proceeding or step taken therein unless it occasions a substantial miscarriage of justice.

Having carefully examined the record of appeal provided to us we have come to the conclusion that there was no form of injustice whatsoever occasioned to the appellant in the peculiar circumstances of the present case.

For the reasons already given, this appeal is utterly devoid of any merit. It is hereby dismissed. The orders made by the court below are affirmed. The appellant will pay the costs of this appeal to the respondent. Lastly, the security deposit paid into court shall be paid out to the respondent to account of its taxed costs.